

CARL J. ORESKOVICH, WSBA #12779
ETTER, McMAHON, LAMBERSON
VAN WERT & ORESKOVICH, P.C.
618 West Riverside Avenue, Suite 210
Spokane, WA 99201
(509)747-9100
(509)623-1439 Fax
Email: carl@ettermcmahon.com

*Attorney for Defendants Zaycon Foods, LLC; Frank and Jane Doe
Maresca; Michael and Jane Doe Giunta; Mike and Jane Doe Conrad; and
Adam and Jane Doe Kremin*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

THE CINCINNATI INSURANCE
COMPANY, an Ohio corporation; and
THE CINCINNATI INDEMNITY
COMPANY, an Ohio corporation,

Plaintiffs,

vs.

ZAYCON FOODS, LLC, a Washington
Limited Liability Company; FRANK
MARESCA and JANE DOE MARESCA,
husband and wife; MICHAEL GIUNTA
and JANE DOE GIUNTA, husband and
wife; MIKE CONRAD and JANE DOE
CONRAD, husband and wife; ADAM
KREMIN and JANE DOE KREMIN,
husband and wife; and RICHARD
BRADDOCK, an individual,

Defendants.

No. 2:17-cv-0140-SMJ

**ZAYCON DEFENDANTS'
RESPONSE TO MOTION
FOR SUMMARY JUDGMENT
AND MOTION FOR FED. R.
CIV. P. 56(d) CONTINUANCE**

COMES NOW Defendants ZAYCON FOODS, LLC, a Washington Limited Liability Company; FRANK MARESCA and JANE DOE MARESCA, husband and wife; MICHAEL GIUNTA and JANE DOE GIUNTA, husband and wife; MIKE CONRAD and JANE DOE CONRAD, husband and wife; and ADAM KREMIN and JANE DOE KREMIN, husband and wife (hereinafter the “Zaycon Defendants”) and hereby moves this Court for a continuance of the time to respond to Plaintiffs’ Motion for Summary Judgment and continuance of the associated hearing date pursuant to Fed. R. Civ. P. 56(d).

FACTUAL BACKGROUND

Plaintiffs Cincinnati Insurance Company and Cincinnati Indemnity Company (“Cincinnati”) filed a Complaint for Declaratory Relief on April 13, 2017, seeking a declaration that they have no duty to defend, indemnify or pay sums to or on behalf of any defendant with respect to the underlying lawsuit, *Braddock v. Zaycon Foods, LLC, et al.*, U.S. District Court for the Eastern District of Washington, Case No. 16-cv-01756 TSZ (the “Underlying Suit”). (ECF No. 1.) The Defendants in this Declaratory Action are all of the parties to the Underlying Suit. (*See* ECF No. 1, Ex. A.) Notably, although Richard Braddock has been named in this Declaratory Action, he has not been served

1 with the Complaint nor made an appearance in this case. He has also not been
2 served with Cincinnati's Motion for Summary Judgment. (*See* ECF No. 16 at
3 22.)
4

5
6 Cincinnati now brings this Motion for Summary Judgment, asserting that
7 the Underlying Suit does not allege any claims that could conceivably fall
8 within any of the coverages provided in the Cincinnati insurance policies issued
9 to Zaycon ("Policies"). (ECF No. 16 at 2.) Cincinnati argues that the
10 Underlying Suit does not allege "bodily injury," "property damage" caused by
11 an "occurrence," or "personal and advertising injury" as defined by the Policies.
12 (*Id.*) Thus, Cincinnati claims coverage should not be afforded. (*Id.*)
13
14
15
16
17
18

19 The Zaycon Defendants assert that coverage should be afforded, that Mr.
20 Braddock is a necessary and indispensable party to this action, and that
21 summary judgment is premature as Mr. Braddock has neither been served with
22 the Complaint nor Motion for Summary Judgment. The Zaycon Defendants
23 assert that additional time is needed to engage in discovery related to the
24 "personal and advertising injury" coverage of the Policies and to respond to the
25 Motion for Summary Judgment is appropriate. (Decl. of Carl J. Oreskovich in
26 Supp. of Mot. for Fed. R. Civ. P. 56(d) Continuance ("Oreskovich Decl.").)
27
28
29
30
31
32

1 “Personal and advertising injury” is defined by the Policies as follows:
2

3 “Personal and advertising injury” means injury, including
4 consequential “bodily injury”, arising out of one or more
5 of the following offenses:
6

7 d. Oral or written publication, in any manner, of material
8 that slanders or libels a person or organization or
9 disparages a person’s or organization’s goods, products
10 or services.

11 (See ECF No. 18, Exhibit B at 95.) The Zaycon Defendants assert that
12 reasonable inferences from the factual allegations or factual conclusions in the
13 Underlying Lawsuit infer claims of “personal and advertising injury” as defined
14 in the Cincinnati Policies.
15
16

17
18 In the Underlying Suit, Mr. Braddock goes to great lengths to demonstrate
19 his experience, pedigree, and reputation as former president and COO of
20 Citicorp, Citibank’s former CEO of Medco Containment Services, Inc.; a
21 former chairman of a private equity fund; and a former director of Marriot
22 International. (See ECF No. 1, Ex. A.) He alleges that the adverse regulatory
23 history of Defendants Conrad and Kremin was not known to him. (*Id.*) Mr.
24 Braddock asserts that he injected capital, increased revenues, and arranged
25 outside equity investment through Vertical Group and Great Hill Partners. (*Id.*)
26
27 Mr. Braddock alleges that the defendants communicated in writing with the
28
29
30
31
32

1 outside investment groups to arrange investment without Mr. Braddock's
2 employment and involvement. Mr. Braddock further asserts that the Zaycon
3 Defendants and others conspired to remove him from employment and from
4 participating in the outside financing after he "had put Zaycon on a trajectory to
5 raise investment capital and to fulfill its potential in the first place[.]" (ECF No.
6 1, Ex. A at 17.) While no communications are specifically referenced in the
7 Complaint leading to Mr. Braddock's removal from Zaycon leadership,
8 certainly such communications occurred "inducing certain Zaycon members to
9 vote for Braddock's removal." (*Id.* at 19.)

10 Defendants have reason to believe, and the Complaint certainly suggests,
11 that communications exist (and/or depositions will reveal) that communications
12 occurred between Zaycon and the individual defendants leading up to
13 Braddock's removal from Zaycon leadership that will afford coverage under the
14 "personal and advertising injury" portion of the Policies. (Oreskovich Decl. at
15 ¶¶ 8-9.) Further, the Zaycon Defendants have identified at least one witness to
16 whom Mr. Braddock has reported that his business and investment reputation
17 was damaged due to statements made by certain Zaycon Defendants. (*Id.*) The
18 witness is currently unavailable for declaration or deposition. (*Id.*)

MEMORANDUM

1. Summary Judgment is Premature Because Not All Necessary and Indispensable Parties Have Been Joined.

Under Fed. R. Civ. P. 19, a person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if (1) in the person's absence the court cannot accord complete relief among the existing parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may, as a practical matter, impair or impede the person's ability to protect that interest or leave any of the existing parties subject to a risk of incurring multiple or inconsistent obligations because of the interest. *See* Fed. R. Civ. P. 19(a).

It is well-settled that individuals in the position of Mr. Braddock are generally considered necessary and indispensable parties in a declaratory judgment action brought to determine insurance coverage for the claim. *Greenwich Ins. Co. v. Rodgers*, 729 F. Supp. 2d 1158, 1164–65 (C.D. Cal. 2010); *Fed. Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 354 n.5 (3d Cir.1986) (in a declaratory judgment proceeding involving an insurance policy, the injured person is an “indispensable part[y] to the action”); *U.S. Fid. and Guar.*

1 *Co. v. Ditoro*, 206 F. Supp. 528, 532–33 (M.D. Pa. 1962) (the injured party is
 2 “a necessary and proper party because the injured party has a material interest
 3 in the outcome of the suit”); *U.S. Fir. Ins. Co. v. The Milton Co.*, 938 F. Supp.
 4 56, 57 (D. D.C. 1996) (“It is clear that an injured party is a *necessary* party in a
 5 declaratory judgment action brought to test the coverage of an insurance
 6 policy.” (emphasis in original)); *American Standard Ins. Co. of Wisconsin v.*
 7 *Rogers*, 123 F. Supp. 2d 461, 467-69 (S. D. Ind. 2000) (injured party
 8 indispensable party to declaratory action regarding insurance policy coverage);
 9 *Colony Ins. Co. v. Events Plus, Inc.*, 585 F. Supp. 2d 1148, 1156-57 (D. Ariz.
 10 2008) (same).

11
 12 A decision in this case that coverage is precluded under the policies will
 13 affect Mr. Braddock’s ability to recover damages should he prevail in the
 14 Underlying Suit. Because Mr. Braddock has an interest relating to the subject
 15 of this suit and because his absence will, as a practical matter, impair his ability
 16 to protect that interest, Braddock is a necessary and indispensable party to this
 17 action under Fed. R. Civ. P. 19. Therefore, in the absence of Mr. Braddock the
 18 Court should not enter a judgment in this case and the instant motion should not
 19 be heard until Mr. Braddock has appeared and been given the opportunity to

1 respond. *See W. Coast Expl. Co. v. McKay*, 213 F.2d 582, 592 (D.C. Cir. 1954)
 2 (“in the absence of [the necessary] parties a court of course cannot validly enter
 3 a judgment”); *see also Kimball v. Florida Bar*, 537 F.2d 1305, 1307 (5th Cir.
 4 1976) (“In the absence of an indispensable party, the federal courts are no more
 5 empowered to render a declaratory judgment than we would be to give
 6 affirmative relief.”).

11
 12 2. A Continuance is Appropriate Under Fed. R. Civ. P. 56(d) to Allow
 13 Defendants Adequate Time to Engage in Discovery.

14 Defendants request a continuance of the summary judgment hearing
 15 because additional discovery is essential to Defendants’ ability to adequately
 16 respond to the Plaintiffs’ Motion for Summary Judgment. Fed. R. Civ. P. 56(d)
 17 states:
 18
 19

20
 21 **(d) When Facts Are Unavailable to the Nonmovant.**

22 If a nonmovant shows by affidavit or declaration that,
 23 for specified reasons, it cannot present facts essential to
 24 justify its opposition, the court may:

- 25 (1) defer considering the motion or deny it;
 26 (2) allow time to obtain affidavits or declarations or to
 27 take discovery; or
 28 (3) issue any other appropriate order.
 29

30 The Rule “provides a device for litigants to avoid summary judgment when
 31 they have not had sufficient time to develop affirmative evidence.” *United*
 32

1 *States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002). A Rule
 2 56(d) “continuance of a motion for summary judgment for purposes of
 3 discovery should be granted almost as a matter of course unless the non-moving
 4 party has not diligently pursued discovery of the evidence.” *Burlington N. Santa*
 5 *Fe R.R. Co. v. The Assiniboine & Sioux Tribes of the Fort Peck Reservation*,
 6 323 F.3d 767, 773–74 (9th Cir. 2003) (internal citations omitted); *see also*
 7 *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (“Although
 8 Rule 56(f) facially gives judges the discretion to disallow discovery when the
 9 non-moving party cannot yet submit evidence supporting its opposition, the
 10 Supreme Court has restated the rule as requiring, rather than merely permitting,
 11 discovery ‘where the nonmoving party has not had the opportunity to discover
 12 information that is essential to its opposition.’ *Anderson v. Liberty Lobby, Inc.*,
 13 477 U.S. 242, 250 n.5 (1986).”)

14 Here, discovery is necessary in order to adequately respond to Cincinnati’s
 15 Motion for Summary Judgment. The claims asserted in the Underlying Suit
 16 include claims against Zaycon and the individual defendants for violation of the
 17 Securities Exchange Act, violation of the Washington Securities Act, fraud,
 18 negligent misrepresentation, breach of fiduciary duty, and declaratory

1 judgment. (ECF No. 1, Ex. A at 24-48.) Some of the specific allegations
 2
 3 include:

4
 5 11. Braddock is the former president and chief
 6 operating officer of Citicorp and its principal subsidiary,
 7 Citibank, N.A.; former chairman and chief executive
 8 officer of Priceline.com, which he had joined during its
 9 startup phase, which he had taken public and which now
 10 has a market capitalization in excess of \$70 billion;
 11 former chief executive officer of Medco Containment
 12 Services, Inc., the largest prescription drug services
 13 company, until its acquisition by Merck & Co., Inc. in
 14 November 1993 for \$6 billion; former chairman and
 15 CEO of FreshDirect, a successful online grocer; former
 16 principal of Clayton, Dubilier & Rice, Inc., a private
 17 equity firm; former chairman of True North
 18 Communications Inc.; former chairman of MidOcean
 19 Partners, a private investment fund; and a former director
 20 of Marriott International, Inc., Cadbury, PLC, Citibank,
 21 N.A., Lotus software and several privately held
 22 companies.

23 ***

24 12. During or about 2009, the Securities Division of the
 25 State of Washington's Department of Financial
 26 Institutions ("DFI") commenced an investigation of
 27 Conrad and Kremin for their promotion and sale of
 28 shares in a company by the name of IFT Holdings, Inc.,
 29 f/k/a Intergrated Fuel Technologies, Inc. ("IFT").

30 ***

31 15. DFI alleged *inter alia* that: (i) Conrad and Kremin
 32 violated RCW 21.20.140, through their offer and/or sale

1 of securities for which there was no registration on file
 2 with the Washington State Securities division of DFI; (ii)
 3 Conrad and Kremin violated RCW 21.20.040 by offering
 4 or selling said securities while not registered as a
 5 salesperson or broker-dealer in the State of Washington;
 6 and (iii) Conrad and Kremin made misstatements of
 7 material fact, or omitted to state material facts necessary
 8 in order to make the statement made, in light of the
 9 circumstances under which they were made, not
 10 misleading in violation of RCW 21.20.010.

11 ***

12
 13 19. On or about January 27, 2010, DFI filed its Entry of
 14 Findings of Fact and Conclusions of Law and Final Order
 15 to Cease and Desist as to Kremin.

16 ***

17
 18 20. The Final Orders required Conrad and Kremin to (i)
 19 cease and desist from offering or selling securities in
 20 violation of RCW 21.20.140, the securities registration
 21 section of the Securities Act of Washington; (ii) cease
 22 and desist from acting as unregistered securities broker-
 23 dealer or salespersons in violation of RCW 21.20.040,
 24 the broker-dealer and securities salesperson registration
 25 section of the Securities Act of Washington; and (iii)
 26 cease and desist from violating RCW 21.20.010, the anti-
 27 fraud section of the Securities Act of Washington.

28 ***

29
 30 49. In addition, during these meetings and telephone
 31 conversations, each of the Individual Defendants, acting
 32 on behalf of himself and Zaycon and the other individual
 Defendants, failed to inform Braddock that a) DFI had

1 initiated an action against Conrad in 2009; b) DFI had
2 issued a Cease and Desist Order as to Conrad in January
3 2010; c) DFI had initiated an action against Kremin in
4 2009; d) DFI had issued a Cease and Desist Order as to
5 Kremin in January 2010.

6 ***
7

8 82. Under Braddock's leadership, and with the benefit of
9 the capital infusions received from Braddock, Zaycon's
10 revenues grew from \$16 million in 2014 to \$25 million in
11 2015, with 2016 revenues projected at \$73 million.
12

13 ***
14

15 84. Once Braddock had put Zaycon on firm footing, the
16 Company determined that the time was right to seek
17 either additional investment or the sale of the Company.
18

19 ***
20

21 85. During or about late 2015 or early 2016, Zaycon
22 retained Vertical Group ("Vertical") to provide
23 investment banking services to the Company. Michael
24 Shwartz ("Shwartz") was the Vertical investment banker
25 assigned to the engagement.
26

27 ***
28

29 86. During or about January 2016, Vertical and Shwartz
30 prepared an investor presentation for Zaycon featuring
31 Braddock as its CEO and Chairman of the Board and
32 highlighting his unique background and qualifications.
33

1 87. Vertical's investor presentation referred to Braddock
2 as the "seasoned" leader of Zaycon's management team,
3 described him as an "experienced CEO in the e-
4 commerce and food industries" and touted both his
5 directly relevant experience as the former chairman and
6 CEO of priceline.com and FreshDirect and his more
7 general high level experience in business and finance,
8 including that gained as formed president and COO of
9 Citicorp and Citibank, N.A.

10 ***

11
12 88. In addition, the Vertical investor presentation noted
13 that Zaycon's year to year sales growth during the years
14 2014 to 2016 (the years of Braddock's involvement)
15 were 20.9%, 50.9% and 193.6% (projected), respectively.

16 ***

17
18 89. On or about April 14, 2016, a private equity firm
19 based in Boston, Massachusetts by the name of Great
20 Hill Partners ("Great Hill") submitted a proposal to make
21 an investment of \$25 million to buy into Zaycon at a pre-
22 money enterprise valuation of \$30 million.

23 ***

24
25 90. The Great Hill proposal contemplated that \$10
26 million would be used to buy equity from existing
27 members of Zaycon and that \$15 million would be
28 invested directly into the Company.

29 ***

30
31 105. To that end, Defendants Maresca, Giunta, Conrad
32 and Kremin asked Vertical and Shwartz whether Great

1 Hill would complete the contemplated transaction even if
2 they fired Braddock.

3 ***
4

5
6 109. Upon information and belief, in an attempt to get
7 rid of Braddock and protect their investment banking
8 fees, and in the face of increasing division within the
9 Company, Vertical and Shwarts told Maresca, Giunta,
10 Conrad and Kremin that Zaycon could go ahead and fire
11 Braddock and remove him from his position as Co-
12 managing Member because Vertical and Shwarts could
13 close the Great Hill deal even without Braddock.

14 ***

15
16 111. As a result, although it had been Braddock's
17 leadership and money which had put Zaycon on a
18 trajectory to raise investment capital and to fulfill its
19 potential in the first place, Defendants Zaycon, Maresca,
20 Giunta, Conrad and Kremin decided to immediately
21 terminate both Braddock's employment and his status as
22 Co-managing Member of the Company.

23 ***

24
25 117. On April 21, 2016, without any advance notice or
26 warning of their intentions, Defendants Maresca and
27 Giunta informed Braddock that the holders of at least
28 80% of the Class A membership units of Zaycon had
29 voted to remove him as a manager, and that he was being
30 terminated as an employee.

31 ***
32

123. Second, Defendants manipulated the voting

process that resulted in the execution of the Consent by fraudulently inducing certain Zaycon members to vote for Braddock's removal, thereby improperly obtaining the 80% majority necessary to oust Braddock as Comanaging Member under the Operating Agreement.

158. Braddock brings this action to recover damages for violations of the Securities Exchange Act of 1934, Rule 10b-5 promulgated thereunder, Washington State securities laws, common law fraud, negligence, breach of contract, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty in an amount to be established at trial in excess of \$6.5 million dollars, and for a declaratory judgment that some or all of the membership units issued to Conrad, Maresca and Kremin and others void.

(*Id.* at 3-24.) Notably, Mr. Braddock is named as a defendant in the Declaratory Action. (*See* ECF No. 1.) Yet he has not been served nor given the opportunity to respond to Plaintiff Cincinnati's Motion for Summary Judgment. (ECF No. 16 at 22.) Mr. Braddock's deposition as well as the deposition of the representatives of the investment banking companies, Vertical and Great Hill Partners, are key to the ability to develop coverage for the specific statements or publications relative to Mr. Braddock's reputation and business expertise that gave rise to his termination from employment and participation in the outside equity funding. Defendants have identified one witness who was a potential

1 investor who attended an investment meeting with Mr. Braddock wherein Mr.
2 Braddock claimed that his business and personal reputation had been injured by
3 statements made by certain Zaycon Defendants. (Oreskovich Decl. at ¶¶ 8-9.)
4

5
6 As noted above, Cincinnati alleges that summary judgment should be
7 granted because the Underlying Suit does not allege “bodily injury,” “property
8 damage” caused by an “occurrence,” or “personal and advertising injury” as
9 defined by the policies. However, “Washington law requires that the duty to
10 defend be analyzed in accordance with the allegations in the complaint in the
11 underlying lawsuit.” *Capitol Specialty Ins. V. Beach Eatery & Surf Bar, LLC*,
12 36 F. Supp.3d 1026, 1034 (E.D. Wash. 2014). “[T]he duty to defend arises
13 when a complaint against the insured, *construed liberally*, alleges fact which
14 *could*, if proven, impose liability upon the insured within the policy’s coverage.
15 The duty to defend...is based on the *potential for liability*.” *Id.* (internal
16 citations omitted) (emphasis in original). If coverage is not clear from the face
17 of the complaint but may exist, the insurer must investigate the claim and give
18 the insured the benefit of the doubt in determining whether the insurer has an
19 obligation to defend. *See Ins. Co. of N. Am. v. Ins. Co. of Pa.*, 17 Wn. App. 331,
20 334, 562 P.2d 1004 (1977). Similarly, facts outside the complaint may be
21
22
23
24
25
26
27
28
29
30
31
32

1 considered if the allegations of the complaint are ambiguous or inadequate. *Atl.*
2
3 *Mut. Ins. Co. v. Roffe, Inc.*, 73 Wn. App. 858, 862, 872 P.2d 536 (1994). An
4 insurer has an obligation to give the rights of the insured the same consideration
5 that it gives to its own monetary interests. *See Tank v. State Farm Fire & Cas.*
6 *Co.*, 105 Wash.2d 381, 388, 715 P.2d 1133 (1986). “Put simply, an insurer may
7 not rely on facts extrinsic to the complaint in order to deny its duty to defend
8 where, as here, the complaint can be interpreted as triggering the duty to
9 defend.” *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d
10 276 (2002).
11

12 Defendants believe that evidence exists that would trigger coverage under
13 the “personal and advertising injury” provision of the policies. While the
14 Underlying Suit does not specifically state causes of action for libel, slander, or
15 publication of material damaging to one’s reputation, factual allegations
16 contained in the Complaint and statements made by Mr. Braddock to third
17 parties demonstrate that Braddock claims that Zaycon, and individual
18 defendants, communicated facts about him to shareholders to remove him as
19 manager and terminate his employment as CEO, thus causing damage to his
20 business reputation. (Oreskovich Decl.)
21
22
23
24
25
26
27
28
29
30
31
32

1 As noted above, Cincinnati has the obligation to consider facts outside the
2 complaint when making coverage determinations; and to engage in
3 investigation giving Defendants the benefit of the doubt in determining whether
4 to defend. While the Complaint in the Underlying Suit does not specifically
5 mention Braddock's business reputation, it does affirmatively detail Braddock's
6 experience and leadership and how Defendants used that good will to put
7 Zaycon on a trajectory to raise investment capital. It also describes that despite
8 Braddock's good name, Zaycon shareholders were induced to throw him out of
9 company leadership. Cincinnati has the obligation, under Washington law, to
10 investigate facts outside of the Complaint that would warrant coverage under
11 the "personal or advertising injury" provision of the policy. Cincinnati has
12 failed to do so here. Instead, Cincinnati seeks to abrogate this responsibility
13 and hastily proceed to Summary Judgment, before all parties are served.

24 It is also important to note that this case is in its early stages. No discovery
25 has occurred to date, and the scheduling order was only just issued on August
26 22, 2017. (ECF No. 24.) The discovery cut-off has been set for December 29,
27 2017. (*Id.*) Because this litigation is in its early stages, Defendants have "not
28 had the opportunity to discover information that is essential to [their]
29
30
31
32

1 opposition.” *Anderson*, 477 U.S. at 250 n.5. In these circumstances, the Ninth
 2 Circuit and the United States Supreme Court interpret Fed. R. Civ. P. 56(d) to
 3 require additional discovery. *See Metabolife Int’l, Inc.*, 264 F.3d at 846;
 4 *Anderson*, 477 U.S. at 250 n. 5. Therefore, Defendants respectfully this Court
 5 exercise its discretion under Fed. R. Civ. P. 56(d) and continue the summary
 6 judgment hearing date for 90 days to serve Mr. Braddock and allow time to
 7 obtain affidavits or depositions to establish facts sufficient for continued
 8 coverage. (See Oreskovich Decl. at ¶ 10.)

15 CONCLUSION

16 For the foregoing reasons, the Zaycon Defendants request the Court to
 17 defer considering Cincinnati’s Motion for Summary Judgment.
 18

19 DATED this 31st day of August, 2017.

20
 21 ETTER, McMAHON, LAMBERSON,
 22 VAN WERT & ORESKOVICH, P.C.

23 By: /s/ Carl J. Oreskovich

24 CARL J. ORESKOVICH, WSBA #12779

25 ETTER, McMAHON, LAMBERSON,

26 VAN WERT & ORESKOVICH, P.C.

27 618 West Riverside Avenue, Suite 210

28 Spokane, WA 99201

29 (509)747-9100

30 Email: carl@ettermcmahon.com

31 Attorneys for Zaycon Defendants
 32

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August, 2017, I electronically filed the following documents:

**RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND
REQUEST FOR FED. R. CIV. P. 56(d) CONTINUANCE**

with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

Gary Sparling
Soha & Lang, P.S.
1325 Fourth Avenue, Suite 200
Seattle, WA 98101
sparling@sohalang.com

/s/Carl J. Oreskovich